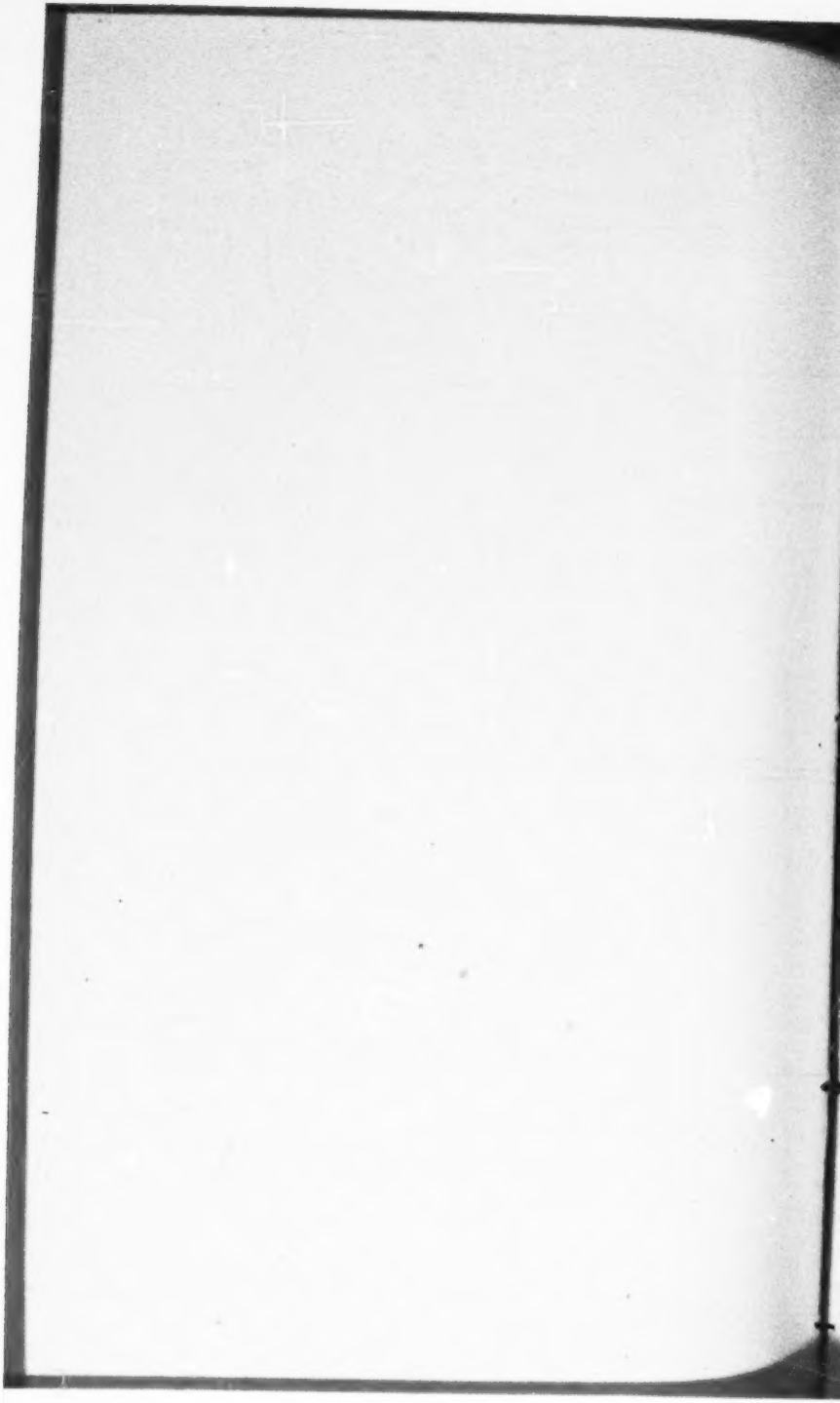

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Supreme Court of the United States

No. 18,648
OCTOBER TERM, 1903
No. 117

GEORGE W. CROSSMAN AND ANOTHER
Plaintiffs

against

THEODORE G. LURMAN AND ANOTHER
Defendants

REPLY BRIEF FOR DEFENDANTS IN ERROR

CHARLES STEWART DAVISON
Of Counsel

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

No. 18,648.

OCTOBER TERM, 1908.

No. 117.

GEORGE W. CROSSMAN and another,
Plaintiffs,

AGAINST

THEODOR G. LURMAN and another,
Defendants.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

The defendants-in-error respectfully request permission to submit the following additional memorandum to the Court relating to certain points raised by the Court during the argument and to the supplemental brief which has been submitted by the plaintiffs-in-error.

I.

The defendants-in-error did not concede by their answer nor have they at any time conceded that the goods were "as called for by the contract." On the contrary, they specifically deny this and did so deny in their answer (Printed Record, p. 8, fol. 11):

> "THIRD.—They admit that on or about the 18th day of August, 1894, the steamship *Catania* arrived at the Port of New York, having on board a large amount of coffee, *but they deny each and every allegation other than the arrival of said steamship* contained in paragraph three of the said complaint, and on the contrary they allege * * * that on examination the said samples were found to embrace samples of coffees which had been colored, coated, polished and powdered, *whereby damage was concealed, and they were made to appear better than they really were, and of greater value*, in contravention, etc."

Also (in the same folio) by a separate paragraph of their answer, they deny this point as to which it is now erroneously claimed there was or is such a concession (Record, p. 8, fol. 11):

> "FOURTH.—They deny that the plaintiff's have complied with the conditions of said contract upon them imposed."

Again, by their answer, they affirmatively allege that no coffees such as were contracted to be purchased by them were ever, in fact, tendered to them (Printed Record, p. 8, fol. 12):

> "And they allege that the said plaintiffs have failed and neglected and refused to comply with the terms of said contract on their, the said plaintiff's, part to be done and performed."

The Court should note that the confusion which the plaintiffs have attempted to introduce into this case is a mere "confusion of terms."

The plaintiffs constantly claim that "grades" of coffee are some mysterious and intricate thing which can alone be understood or comprehended by "experts."

The plaintiffs constantly claim that if "graders" have "graded" the substance that that makes it "coffee." Under such a claim it might be in fact oats or wheat or wooden shoe pegs or wooden nutmegs, but it officially becomes "*Coffee grade 9.*"

If the question arises how graders came to grade this artifically colored and damaged stuff as coffee and how they came to find it to be "approximately grade 9" of the New York Coffee Exchange, it is explained at once by referring to the printed record.

At page 69 of the printed record Mr. Schilling, the ultimate "grader" of the coffee (the so-called "arbitrator of grades"), who was called as a witness by the plaintiffs, testified under cross-examination:

1. That he had not seen this coffee *before* it was coated or powdered.

2. That he did not wash any of it.

3. That he did not take a rag or anything else and rub any of the coloring matter off so as to see what he could see after removing the coloring matter.

4. That he did not do anything in the way of removing any of the yellowish substance for the purpose of seeing what appearance in fact the coffee would have after the removal of the yellow ochre.

5. That the super-imposition of the yellowish matter did make the whole of the coffee of a general yellowish appearance to a certain extent.

That is, he "graded" this coffee in its artificially colored condition (and he was the "grade arbitrator" concerning whom the plaintiffs advance such extensive claims). His opinion that he could grade it just as well whether it were artificially colored or not may be genuine, difficult as it is to believe such an assumption; but since the grade of coffee depends upon its (*natural*) color (that is, since poor coffees are more diversified in color than good coffees which are more uniform in color, though some are dark and some are light); and as he also testified (a few lines below) that it was a fact that the addition of this coloring made the coffee appear a different color from the natural color that particular sample would have been, it is charitable to assume that he gave it a higher grade (that is, brought it technically within "grade 9") than he would have given it had he ever actually seen the coffee itself. If this charitable assumption be not indulged in, we have swearing that he could judge *natural* coloration though an opaque medium (yellow ochre).

As for the original graders, one of them, Mr. Small (the plaintiffs' grader) was also called as a witness by the plaintiffs, and under cross-examination he testified (Printed Record, p. 77, fol. 109) that the coffee was colored, the beans being more or less entirely covered up, and that it had been done with some completeness of process.

He said (and it must be borne in mind that he was one of the graders) that *it was very hard for him to tell whether all of the beans were covered or not.*

It also seems that Mr. Small was a person who had been disciplined and suspended from the Coffee Exchange for putting too high grades as a grader on coffee.

He claimed that, having washed this coffee, he found much better coffee than he thought it was before he washed the coloring matter off it. Whereupon he was shown two glass bottles of coffee from

which he poured the contents into pans (they were Exhibit No. 10 and Exhibit No. 4), and he said that Exhibit 4 was the better coffee; and Exhibit 4 was the *artificially colored Catania coffee unwashed;* while Exhibit 10 was a bottle of the same adulterated stuff *with the adulteration washed off.* Further comment on the "graders" and the class of testimony they gave seems unnecessary.

II.

The defendants claim and have always claimed that they contracted for five hundred bags of NATURAL coffee and that the adulterated coffee, being covered up and coated over with yellow ochre; so that damage was concealed and it looked to be better than it really was and appeared to be of greater value; was not what they had contracted for.

The Court will remember that the plaintiffs' counsel on the argument violently protested against the idea that the defendants were entitled to receive *natural* coffee under the contract.

This view could only be sustained on the assumption that the contract does not *specify* that it was to be "*natural coffee*"! Whoever heard of a mercantile contract that provided affirmatively that adulterated goods were not to be tendered under it!!

The contract provides for the sale and purchase of five hundred bags of Rio coffee, which are by the vendors warranted "*sound and made sound portion.*" That is, if any of the coffee which is tendered is unsound, the plaintiffs agree to substitute sound coffee therefor. Surely coffee coated with yellow ochre so that it looks better than it really is and of greater value, and its damaged condition is thereby concealed, does not comply with the definition of "sound coffee."

Under these circumstances is it too violent an assumption to suppose that the plaintiffs did contract for "*natural coffee*"? But if they contracted for natural coffee and if what they were tendered was not natural coffee, but artificially colored and coated coffee, all questions about "grading" become immaterial.

The allegation of the complaint is (Printed Record, p. 6, middle of fol. 8):

> "That the said plaintiffs have duly complied in all respects with each and every condition of the said contract upon them imposed."

The issue tendered in the answer as to this is; as quoted above; an express denial and again an express allegation to the contrary.

The concession of the plaintiffs that the coffee was artificially colored and coated over with this yellow ochre was sufficient to sustain a direction of a verdict for the defendants without regard to the statute.

The fact that the Court sent it to the jury to find as to a further fact; whether the coffee was obnoxious to law as being adulterated, and that the jury found that this was the fact, would not justify a reversal even had there been no statute or even if the statute were unconstitutional.

III.

The claim on the part of the plaintiffs that they desired to show a trade in the South and Southwest in artificially colored coffees is, in addition to what has been said on this subject in the brief, open to the further objection that if there ever was such a

trade it was surreptitious and unlawful. For example:

The statute of ALABAMA (Code, § 4074—adopted in 1886) provides:

> "Any merchant, grocer or other person who mixes any foreign matter or substance with sugar, syrup * * * or other article of food so as to * * * change the quality thereof, &c., &c., shall be fined, &c."

In TEXAS, by the Penal Code in operation in 1894, it was provided by Article 432:

> "An article shall be deemed adulterated within the meaning of this chapter
> (*b*) in the case of food or drink * * *
> (*f*) if it be colored or coated or polished or powdered, whereby damage is concealed or it is made to appear better than it really is or of greater value."

(The citation given is from an edition of 1895, but this provision was adopted April 10, 1883, *so that the New York statute is simply a copy, eleven years afterwards, of the Texas act*, and yet the plaintiffs claim that the South has been slow to protect itself in this respect.)

In MISSISSIPPI the Code (in the Revised Statutes of 1892) provides, Section 2096:

> "An article of food shall be deemed adulterated * * * (*g*) if it be colored or coated or polished or powdered, whereby damage is concealed or it be made to appear better than it really is or of greater value."

By Section 2095 the term food is made to include every article used as food or drink by man.

In TENNESSEE the Code of 1884 provides, Section 4829 (M and V 5632):

> "It shall be a misdemeanor (2) for any person fraudulently to adulterate for the purpose of sale any substance intended for food or

any wine * * * or other liquor intended for drink."

In LOUISIANA (Revised Statutes, 751), Laws of 1880, Act. 20, p. 23, is found an article to prevent the sale of adulterated food:

> "Sec. 1. That it shall be unlawful for any person or persons to adulterate or sell, or offer to sell, in the State of Louisiana any article of food and sustenance knowing the same to be adulterated."

See also Laws of 1882, Act ~~of 1882~~, page 103, which is an act to define and punish the adulteration of drugs, food and drink, &c., making it a misdemeanor; of which Section 2 provides:

> "An article shall be deemed adulterated within the meaning of this act * * * in the case of food or drink if any substance has been mixed with it so as to lower or injuriously affect its quality or strength or if any inferior or cheaper substance or substances have been substituted wholly or in part for the pure article."

And the same Act provides:

> "Section 3. No person shall manufacture, sell or offer for sale within this State any drug, groceries, such as sugar, *coffee* * * * or any other article to be consumed as food or drink unless the package when sold at wholesale, or the package from which it is taken when sold at retail be stamped in plain large letters showing the true quality and kind of article sold, within the meaning of this Act, etc."

In MISSOURI the Revised Statutes of 1889, Section 3879, provides:

> "Every person who shall fraudulently adulterate for the purpose of sale anything intended for food or drink, or any drug or

medicine, shall be deemed guilty of a misdemeanor."

Sufficient, it would seem, has been cited to show that the trade in adulterated coffees in the South, which the plaintiffs *now say* they so strenuously desired to prove, must have been at best a somewhat precarious one as well as an unlawful one.

IV.

The suggestion was made on the argument by the plaintiffs-in-error that the defendants have silently conceded that the adulterated coffee was not poisonous. They take the position apparently, that food to be "adulterated" must be adulterated with something poisonous, and they claim that there can, therefore, be brought from a foreign country into the State of New York, or from an adjoining State, into the State of New York, an article of food adulterated with something which is non-poisonous, and that trade therein; that is, the attempt to resell such adulterated article; in New York would be protected by the commerce clause of the Constitution of the United States.

As to this, two considerations arise:

FIRST.—Yellow ochre (which is the adulterant here) is an oxide of iron, or technically, a basic ferric salt. The plaintiffs claim that it is to go outside of the record to refer to the dictionary, but it is submitted that the dictionary is always present in every case, and a consultation of the dictionary will show that there is no element in yellow ochre which is salubrious, or which aids directly or indirectly in sustaining life. It is, in fact, a salt of iron with an admixture of silica and

alumina. The plaintiffs-in-error would have us close our eyes to our common knowledge, which is that yellow ochre, while not a deadly poison, is not the best possible thing to take into the human system.

Second — But even assuming that it were wholly innocuous even in large quantities; let us take an example of an absolutely innocuous adulterant and apply the plaintiffs' contention:

Assuming that twenty cans of milk brought from New Jersey across the North River in to the State of New York have been adulterated with water.

It is still milk *in one sense*. The adulterant is innocuous. The mixture is not of itself either poisonous, noxious, or harmful.

Is it beyond the police power of the State to forbid the sale, and is watered milk an article of interstate commerce protected by the Constitution of the United States?

So also many other articles (as cider or vinegar) adulterated with water are clearly "adulterated," although the adulterant is harmless.

Spirits which are below the standard of proof would be another example.

It is submitted that the plaintiffs have overlooked the primary meaning of the word "adulteration." It simply means the "addition of something else," being derived from *ad* and *alter*. To resort again to the Dictionary, to adulterate is defined by Webster as being: to corrupt, debase or make impure with an admixture of baser material. As an adverb, it means debased by foreign material, and the same authority gives as definition for the word as a noun (adulteration) the act of adulterating or the state of being adulterated; corruption or debasement by foreign material.

V.

A careful examination of the Act of Congress (Laws of 1890, Chapter 839) moreover will show that in order that an article of food shall be deemed to be adulterated within its meaning, *it is not necessary that it should be mixed with either a poisonous or a noxious chemical.*

One of the purposes of the act is shown by its title to be the

> "prohibiting the importation of adulterated articles of food or drink."

And it is provided by

> "Section 2: That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug or any spirits or malt liquors adulterated or mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health, &c., &c."

> "Section 3. That any article designed for consumption as human food or drink, and any article of the class or description mentioned in this act which shall be imported into the United States contrary to its provisions shall be forfeited to the United States, and shall be proceeded against, &c."

Rejecting from the language that which does not apply to food, and we have a statute reading as follows:

> "Section 2. That it shall be unlawful to import into the United States any adulterated * * * food. * * *"

This then brings us back to the consideration of the meaning of the word "adulteration," and as has

been shown above, adulteration can as well be by a substance harmless in itself (for example, water), as by a substance more or less noxious (for example, yellow ochre), or by a poisonous substance (for example, strychnine).

VI.

It will be noted that in the supplemental brief for the plaintiffs-in-error, page 2, paragraph 2, the plaintiffs' counsel advance the claim that the case should be sent back if it was "*tried upon the wrong theory*"; but, as stated above, in view of the fact that the contract calls for five hundred bags of sound coffee; that the complaint inferentially alleges they tendered sound coffee; that the answer denies that they tendered sound coffee; that the plaintiffs admit that the coffee was artificially colored (Printed Record, p. 15, beginning of fol. 25).

> "Mr. Kellogg: There is no question but that
> "this coffee had a foreign coloring matter
> "upon it."

that, therefore, a direction of a verdict would have been sustained on these facts alone; it would seem an idle thing, if the cause has been rightly adjudged, to send it back for a new trial in order that a verdict might be directed instead of one received from a jury on the additional point of adulteration.

The Court will note that the action was brought more than nine years ago; that it was three times tried before a jury; three times appealed to the Appellate Division of the Supreme Court; once appealed to the Court of Appeals, and it is submitted that it has been sufficiently litigated.

VII.

That the plaintiffs' claim on the argument that this was an attempt on the part of the defendants to avoid a possible loss of a trifling amount of money ($1,300) is not well founded, nor is the insinuation that they sought to reject goods because of a falling market justified, it is submitted, as will become apparent on considering that which appears in the record.

It appears by the testimony of the plaintiff that there were proceedings taken in the New York Coffee Exchange in relation to these matters, that both the plaintiff and the defendant are members of the New York Coffee Exchange (Printed Record, p. 17, fol. 27); that Mr. Lurman appealed to the various committees; that all his appeals were rejected; that the plaintiffs complained of him to the Coffee Exchange; that they made a charge against him; that he was suspended from the Exchange; that he brought proceedings in court and that he was reinstated by the courts as the result of those proceedings; and if this Court will look at the opinion handed down by the General Term of the Supreme Court, on his reinstatement (Matter of Lurman, 90 Hun, 303), it will see at a glance the position of the Courts of New York, concerning the class of proceedings which were taken against the defendant in the Coffee Exchange, as also the Court's opinion of the good faith in which the defendants have acted.

The Court at page 311 says:

> "That this particular lot had coloring matter upon it is conceded by all who saw the coffee, thus raising at least a fair presumption that the claims advanced by the petitioners were based upon some foundation and was made in apparent good faith. Notwithstanding this the record shows that *the graders and the Exchange were seemingly fearful of the issue and studiously avoided*

even giving a hearing on the merits to the claim advanced,

the Court having already said (p. 309) that

> " the whole machinery of the Exchange, being seemingly brought to support the proposition that it would allow no investigation of an official character upon the question of fact as to whether the coffee tendered to the petitioner for his refusal to receive which he was suspended, was or was not as alleged by him adulterated."

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